

**Precision Window Manufacturing, Inc. and Aluminum, Brick & Glass Workers International Union, AFL-CIO, CLC.** Case 14-CA-20527

July 31, 1991

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On November 16, 1990, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief limited to the remedy granted with respect to the discharge of employee Steve Sitzes.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the judge's recommended Order.

Contrary to our dissenting colleague, for the reasons set forth below, we agree with the judge that Steve Sitzes did not engage in postdischarge conduct that warrants the forfeiture of his right as a victim of an 8(a)(3) discrimination to remedial relief here. Thus, we adopt the judge's recommendation to provide reinstatement and backpay for Sitzes.

The Respondent has not contested the judge's finding that it discharged Sitzes because of his union activity. The evidence shows that after the Respondent discharged him, Sitzes was so upset that, while he was leaving the plant, he cursed First-Shift Supervisor Ricky Hixon, called him obscene names, challenged him to a fight, and threatened to kill him. The judge found that "[t]he killing was evidently to occur at 4:30, when the plant closed down."

Sitzes did return to the plant at quitting time. He remained seated inside his car, talking through the window with other employees who gathered around. The Respondent called the police, who arrived promptly and asked Sitzes to leave the premises. He left immediately and did not return. He subsequently testified that he had returned at 4:30 p.m. to pick up his carpool riders, an assertion the judge found to be uncontradicted.

In determining whether backpay and reinstatement are appropriate remedies in cases where the employer has claimed employee misconduct, the Board traditionally "looks at the nature of the misconduct and denies reinstatement in those flagrant cases 'in which the mis-

conduct is violent or of such character as to render the employees unfit for further service.'" *C-Town*, 281 NLRB 458 (1986), quoting *J. W. Microelectronics Corp.*, 259 NLRB 327 (1981). Furthermore, the Board takes into account whether the misconduct was an "emotional reaction" to the employer's own unlawful discrimination against the employee. *Blue Jeans Corp.*, 170 NLRB 1425 (1968), citing *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965). Here, Sitzes made verbal threats in immediate response to the Respondent's act of discriminatorily discharging him. Although the dissent attempts to distinguish Sitzes' words from those uttered by unjustly terminated employees in other cases in which the Board declined to deny traditional remedies, we cannot see a reasonable distinction. Contrary to the dissent's portrayal of a stark threat to kill, we find that even Hixon's account of Sitzes' outburst indicates that it was a rambling, semicoherent mix of insult and threat. As indicated above, Sitzes did not repeat any of his statements when he returned at quitting time, and his appearance then was entirely consistent with his uncontradicted claim that he was there to pick up departing employees in his carpool. Thus, while we of course do not approve of Sitzes' threats and other offensive remarks, we find that, under all the circumstances, his statements did not rise to the level of conduct so flagrant as to require forfeiture of reinstatement and backpay.<sup>1</sup>

The dissent's implication that the Board's recent decision in *Family Nursing Home*, 295 NLRB 923 fn. 2 (1989), supports a different result is clearly misplaced. The Board denied remedial relief to the discriminatee there because she physically assaulted the employer's director of nursing following her discharge. In this case, by contrast, Sitzes did not engage in any kind of violence.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Precision Window Manufacturing, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, dissenting in part.

I strongly disagree with my colleagues' adoption of the judge's finding that employee Steve Sitzes did not forfeit his right to reinstatement and backpay by threatening to kill his supervisor, Ricky Hixon.<sup>1</sup> The credited or undisputed evidence is as follows. On January 9, 1990, Vice President Brian Brannick and First-Shift Supervisor Ricky Hixon told Sitzes that he was dis-

<sup>1</sup> In deciding whether Sitzes' conduct was, under the circumstances, so outrageous as to require forfeiture of remedies, we do not take issue with our colleague's conclusion that Hixon felt threatened or that calling the police may be a reasonable course of action whenever a discharged employee utters a threat of violence. We simply disagree that those conclusions are material to the issue here.

<sup>1</sup> The judge found that Sitzes had been discharged for his protected concerted activity in violation of Sec. 8(a)(3) and (1). As noted in the majority decision, no exceptions were made to this finding.

charged. Sitzes responded, "I hope you guys feel like big men now" and proceeded to leave the plant. However, as Sitzes was walking onto the parking lot, he noticed Hixon at the door of the loading dock 25 feet away. Sitzes cursed Hixon, called him obscene names, and challenged him to fight. In addition, in clear and unambiguous language, Sitzes said twice that he was going to kill Hixon.<sup>2</sup> He also said that he would return at 4:30 in the afternoon to carry out these threats. Sitzes returned at quitting time (4:15 p.m.), allegedly to pick up his carpool riders.<sup>3</sup> The Respondent then telephoned the police and they arrived promptly. Sitzes left when the police requested him to do so.

I agree with the general principle that "[a]n employer cannot provoke an employee to the point where she commits . . . an indiscretion and then rely on this to terminate her employment . . . . The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression."<sup>4</sup> However, a provoked employee does not have an unlimited right to engage in misconduct without losing his remedial rights. The Board has never found that reinstatement and backpay should be provided to an employee regardless of the nature of the employee's misconduct committed in response to the alleged provocation.<sup>5</sup>

Quite simply, the issue is where the line should be drawn, i.e., whether the conduct is so "violent or of such character as to render an employee unfit for further service."<sup>6</sup> I would deny these remedies where an employee has engaged in misconduct as serious as a threat to kill. By its very nature, a threat to kill is a threat that is more serious than any other. Vague threats to "get" a supervisor<sup>7</sup> or profane remarks<sup>8</sup> pale by comparison to a threat to kill. In the instant case, Sitzes' threat was even more specific. He told Hicks that he would return at 4:30 p.m. to carry out the threat. Sitzes returned, just as he said he would, a few minutes before 4:30 p.m. Because of this return, and in light of the earlier threat, the Respondent telephoned the police. The police responded and apparently arrived within minutes. Sitzes left only after the police asked him to do so.

In adopting the judge's finding that Sitzes did not engage in misconduct sufficient to forfeit his remedy,

<sup>2</sup> Sitzes admitted he threatened to "beat [Hixon's] Mexican face in." The judge found no meaningful difference between that threat and Hixon's testimony that there was an explicit threat to kill.

<sup>3</sup> The judge did not expressly credit Sitzes' claim that he returned for his carpool riders. Instead, he found that no evidence contradicted the claim and that it was not inherently unbelievable.

<sup>4</sup> *Blue Jeans Corp.*, 170 NLRB 1425 (1968), citing *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

<sup>5</sup> See, e.g., *Family Nursing Home*, 295 NLRB 923 fn. 2 and cases cited therein (1989).

<sup>6</sup> Id. at fn. 2, quoting *J. W. Microelectronics Corp.*, 259 NLRB 327 (1981), enf'd. 688 F.2d 823 (3d Cir. 1982).

<sup>7</sup> See, e.g., *Anaconda Insulation Co.*, 298 NLRB 1105 (1990).

<sup>8</sup> See, e.g., *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988).

my colleagues emphasize that there is no evidence that Sitzes returned to the plant for the purpose of carrying out his threat to kill. That can be said with the benefit of hindsight and with a sigh of relief. At the time of the events, there was no such comfort. Sitzes had uttered a threat to return at an appointed hour for the avowed purpose of killing Hixon. He had then taken overt steps consistent with the threat. By returning at the appointed hour, he had done precisely what he had said he would do. The police were called and, in apparent recognition of the danger, came to the site immediately. The threat was relieved only after the police persuaded Sitzes to leave.

It is not enough to say, more than a year later, that there is no evidence that Sitzes actually intended to carry out his threat. In his own mind, Sitzes may have known all along that he was bluffing. But Hixon did not know that. As he saw it, Sitzes was proceeding step-by-step, just as he said he would, to carry out a threat to kill. In these circumstances, Hixon would reasonably conclude that the threat was not an idle one, and would reasonably be terrified at the unfolding course of events.<sup>9</sup>

I do not believe that we should extend our remedial aid to a person who utters a threat to kill and then takes overt steps consistent with the threat. Accordingly, I dissent from my colleagues' grant of the remedy here.

<sup>9</sup> In concluding that Hixon could reasonably be terrified, I cannot ignore the regrettable fact that, all too frequently, discharged employees return to the workplace to commit violent acts against those whom they hold responsible for their discharge.

*Lucinda L. Morris, Esq.*, for the General Counsel.

*Craig A. Sullivan, Esq. (Anderson, Gilbert & Garvin)*, of St. Louis, Missouri, for the Respondent.

*James M. Mosley*, of Bridgeton, Missouri, for the Charging Party.

## DECISION

BERNARD RIES, Administrative Law Judge. This matter was tried in St. Louis, Missouri, on April 23–24, 1990.<sup>1</sup> The complaint, as amended, alleges that the Respondent violated Section 8(a)(1) by various statements made to its employees by its agents; unlawfully issued written warnings to, and discharged, two employees; and unlawfully laid off four employees.

Briefs were received from the General Counsel and the Respondent on or about June 1.<sup>2</sup> Having reviewed the tran-

<sup>1</sup> The charge was filed on January 10, 1990; an amended charge was filed on February 22; the complaint issued on February 26; an amendment to the complaint issued on March 31; and the complaint was once again amended at the hearing.

<sup>2</sup> On June 8, Respondent filed a motion to strike the General Counsel's brief "due to misrepresentations of the record." General Counsel filed an opposition to the motion on June 15. As General Counsel points out, the motion to strike is essentially a reply brief. The Board's Rules and Regulations do not make specific provision for the filing of reply briefs, and no request was made

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script of proceedings and the exhibits, having considered the briefs, and having taken into account my impression of the reliability of the witnesses, I make the following

#### FINDINGS OF FACT<sup>3</sup>

##### I. THE BASIC FACTS

Respondent employs some 40 persons in the manufacture of custom replacement windows at its St. Louis facility. It is owned by three individuals identified as Dick Ahrends, Bob Miles, and Larry Cox. Although the trial did not go into the matter in detail, it seems clear that Respondent was established in the spring of 1989 principally for the purpose of manufacturing windows for each of the co-owners, who use the windows in some retail capacity in their own businesses. Also somewhat obscure, but clear enough, is the fact that Respondent is operating with the guidance of a firm, called Spectus Systems, which designs and extrudes the window system that Respondent uses.

The most important active official of Respondent is Brian Brannick, who was hired in 1988 to establish the plant from the ground up, and who stayed on as vice president. The second-in-command on the production floor is Ricky (Rick) Hixon, who was elevated from quality control to the position of first-shift supervisor in mid-August, 1989.<sup>4</sup> The only other principal management official was Elmer Erutti, who identified himself at the hearing as "purchasing agent and personnel administrator."<sup>5</sup>

##### II. THE ALLEGED THREATS IN NOVEMBER 1989

The complaint alleges that on or about November 20, 1989, Vice President Brannick threatened employees with plant relocation and loss of wages and benefits if the plant was unionized, thereby violating Section 8(a)(1).

The record is unclear as to the precise date on which Brannick held a meeting of all 40 employees, but that is not important, for Brannick admits that he did meet with them sometime around November, and the reason he did so was that an antiunion employee had told him that an effort was being made to organize the plant.<sup>6</sup> Several employees testified that the meeting was held on November 20, a detail which seems less than memorable, and all that each of them recalled Brannick saying in a 20-minute speech was that, in substance, if the Union came in, Respondent would (1) close the doors and move to Oklahoma,<sup>7</sup> (2) cut the employees' pay, and (3) reduce annual vacations from 2 weeks to 1.

It seems odd that the employee-witnesses basically (although with some variations) remembered just these three topics from a 20-minute speech. One of the witnesses did not mention these statements in his pretrial affidavit, and he tes-

tified that he recalled the remarks as a result of being refreshed by discussion with other witnesses. There is no doubt, as the testimony of one witness shows, that the witnesses consciously attempted prior to trial to conform and "refresh" their testimony. At the same time, with two exceptions to be noted later, they all left an impression of honesty. However, since Brannick was a smoothly convincing witness, I might have discredited the employee witnesses, except for one thing: Brannick virtually admitted one part of their assertions and did not deny the rest.

On direct examination, Brannick was not asked by Respondent about the speech other than an attempt to show that it would not have been given on November 20. On cross, while Brannick denied that he had told the employees at the November meeting that "if the Union came in, the plant would move to Oklahoma," he candidly conceded having said that "if the Union came in, the plant could possibly move to Oklahoma." He was not asked on direct or cross about the threatened wage and vacation losses, and so that testimony went unchallenged.

As I noted at the hearing, there is an incongruity between a decisive declaration by Brannick that the plant would move to Oklahoma and a threat of reduction in benefits, since if the former occurred, it seems questionable that Brannick would have thought that the employees would care one way or the other about the latter. What seems most likely is that Brannick did say that the plant *might* move to Oklahoma in the event of unionization, but that even if it did not, benefits would be diminished. Given Brannick's admission and his failure to deny the other statements, as well as my general sense that the employees were not fabricating, I conclude that Brannick very probably made remarks along those lines. Such statements, of course, are violative of Section 8(a)(1). *Mack's Supermarkets*, 288 NLRB 1082, 1095, 1099-1100 (1988).

##### III. THE ALLEGED THREAT TO BEIS IN DECEMBER 1989

Employee Douglas Beis, an alleged discriminatee who was laid off for 7 weeks and is currently employed elsewhere, testified that on December 22, in a conversation with Brannick (the contents of which he could not otherwise remember), he "distinctly" recalled Brannick saying that "if a union came in, he would move the plant to Oklahoma." Brannick's denial was not specific; he said "No" to the question "During December did you and Doug Beis have any conversations concerning the Union?" The form of this question contains loopholes which leave Brannick's answer less than a total denial of the thrust of Beis' testimony (e.g., Beis might have erred as to the month). Beis made a good impression while testifying, particularly in his willingness to criticize the performance of fellow alleged discriminatee Neff. While Brannick also earns points for his admission regarding the November speech, his concession that he at that time spoke of relocating obviously bolsters Beis' testimony about a similar comment in December. I conclude that Respondent again violated the Act by Brannick's statement to Beis in December about relocating the plant.

##### III. THE ALLEGED THREATS IN EARLY JANUARY

The record does not show that there was any overt union activity between Brannick's November speech and sometime

by Respondent for permission to file such a brief. I shall therefore grant General Counsel's motion to strike. On September 17, General Counsel filed a request that I take notice of a recent Board case. No opposition has been filed. Since I am bound to take notice of all such relevant cases, I shall do so here.

<sup>3</sup> Certain errors in the transcript have been noted and corrected.

<sup>4</sup> As discussed later, Respondent initiated a second shift of 20 employees in August 1989, but discontinued it in November.

<sup>5</sup> Both Brannick and Erutti testified that they planned to leave Respondent's employ in the summer of 1990.

<sup>6</sup> Around that time, an employee named Joe Marciante had contacted the Charging Party.

<sup>7</sup> Three of the witnesses made the statement somewhat more tentative—that Respondent would "probably" relocate.

in early January. According to Brannick, on January 2, the first day after the Christmas shutdown, employee Steve Sitzes asked him when the employees would be receiving copies of promised revised handbooks; Brannick said that it would probably be the next morning.

When Sitzes asked Brannick the same question again the following morning, Brannick told him the handbooks would be distributed in the afternoon. Sitzes inquired about the changes in the revised manual and was told that 2 personal days would replace the then-existing 3 sick days and Respondent would not be paying for military leave or jury duty. Sitzes asked about wage increases, which, he asserted, Brannick had said would be forthcoming in January. Brannick replied to the effect that raises would depend on Respondent's profitability.

Shortly thereafter, Supervisor Hixon allegedly reported to Brannick that "production was virtually stopped" because Sitzes was "going to people throughout the plant complaining that they're not going to get a raise at the beginning of January, complaining that they didn't get a Christmas bonus and basically complaining about what [Brannick] talked to him about the handbook." Brannick decided to call an immediate plant meeting, but first, he says, he told Sitzes that he "didn't want him going around the plant complaining about the handbook and stopping production" and that "there was ample time to talk about the handbook at lunch and before and after work"; Sitzes said "fine," that he "wasn't causing trouble and that he had no problem with the handbook."

Very soon thereafter, at an employee meeting, Brannick told the employees that "if they didn't care for the changes in the handbook . . . they can always quit and leave, that there was the front door." He further admitted that he said that he "didn't want people causing trouble in the plant or starting any type of cancer in the plant" because they had a good team. By "cancer," Brannick testified, he was referring to "people being upset" about the lack of a Christmas bonus and the handbook changes.

Contrary to Brannick's testimony that Hixon had informed him that Sitzes had "virtually stopped" production "throughout the plant," Hixon offered the more modest testimony that he had reported to Brannick that "a couple of the girls [Barbara Lampston and Barbara Haywood] and one other person [probably Raymond Cato] just said [Sitzes] was annoying them while they were working"; he did not mention having said anything to Brannick about a loss of production, despite a leading question by Respondent as to whether he had reported that Sitzes had been "causing the production to slow down." I therefore discredit Brannick's version of what Hixon told him.

Sitzes' account of these events differed somewhat from Brannick's. Sitzes testified that after speaking to Hixon on the morning of January 2 about Christmas bonuses and raises (Hixon had reportedly said there would be no raises until an employee had worked for a year; Sitzes had retorted that Brannick had promised an across-the-board January raise), he saw Hixon enter Brannick's office, following which, minutes later, Brannick came to Sitzes' work station. He allegedly told Sitzes twice that he did not need him "stirring up cancer and causing trouble in the plant." At the employee meeting immediately thereafter, according to Sitzes, Brannick was "really hostile" (to the point, as several witnesses testified,

of punching the cardboard box in which the new handbooks were packed) and said that he "did not want anybody causing trouble in the plant or starting up cancer, if you don't like it, you know where the door is."

Since Brannick admitted warning the employee meeting to stop "causing trouble in the plant or starting any type of cancer in the plant," his testimony that he immediately prior thereto only told Sitzes directly to cease "complaining about the handbook and stopping production" seems doubtful, especially considering Brannick's dubious embroidery that he said Sitzes was free to complain on his own time. Moreover, since Hixon evidently said nothing to Brannick about Sitzes "stopping production," that also seems to be an embellishment for purposes of litigation. Although I did not think Sitzes to be a reliable witness, I am inclined to believe that Sitzes was telling the truth on this occasion.

On brief, General Counsel does not argue that the statements were related to any union activity by Sitzes. It is claimed, rather, that Brannick's invitation to all dissatisfied employees to quit, and his admonitions against "stirring up trouble" or "causing cancer" in the plant, made in reference to employee complaints or potential complaints about the handbook and terms and conditions of employment, are reasonably considered to be coercive, in violation of Section 8(a)(1).

The Board has held that urging employees to quit if they concertedly express dissatisfaction with working conditions is coercive, constituting both a threat that further complaints will result in discharge and an indication of the futility of communicating concertedly. *Bill Scott Oldsmobile*, 282 NLRB 1073, 1082 (1987). The same would be true of admonitions against causing "trouble" or "cancer," if those admonitions were reasonably understood to refer to protected concerted activity.<sup>8</sup> In recent cases, the Board has held (in what seems to be a retreat from its embracement in *Meyers Industries*, 281 NLRB 882, 887 (1986), of *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)) that there is a "Section 7 right to discuss wages," *Super One Foods #601*, 294 NLRB 462 (1989); *Chatham County of High Point*, 293 NLRB 159 (1989); *Whittaker Corp.*, 289 NLRB 933 (1988), Brannick's reactions to Sitzes' efforts to talk to a few employees, concerning terms of employment, both as conveyed individually to Sitzes and collectively at the employees meeting, violated this principle. Hixon's testimony, even if credited, that he told Brannick that Sitzes was "annoying" two or three workers, without any showing that Sitzes had actually interfered with their production,<sup>9</sup> is both too indefinite and too limited to strip Sitzes' conduct of its statutory protection.<sup>10</sup>

I find, accordingly, that by his remarks on January 2 to Sitzes about causing trouble and cancer, as reinforced by their repetition that morning to all the employees, including Sitzes, as well as by telling the employees and Sitzes that if they did not care for working conditions, they had the right to leave, all of which was based on Sitzes' statutorily

<sup>8</sup>In this case, Brannick conceded that he told the employees that he was referring to their attitude about "changes in the handbook."

<sup>9</sup>The Board's doctrine that employees are statutorily entitled to discuss matters of potentially common concern during worktime in the absence of a published rule to the contrary appears to still be the law. *Davlin Inc.*, 198 NLRB 281 (1972).

<sup>10</sup>The record shows that Sitzes worked within a matter of feet from Lampston and Haywood. Neither was called to testify.

protected activity, Respondent violated Section 8(a)(1) of the Act.

V. THE ALLEGED VIOLATION AT THE JANUARY 8 MEETING; OTHER ALLEGED 8(A)(1) VIOLATIONS

On January 4, Sitzes, who evidently had, at some uncertain time, taken over the job of being the contact person with the Union, set out a pad of paper on the table at which Sandra Woods worked, and Sitzes, Woods, and Danny Rubel spread the word that any employees interested in having a union should write their names and telephone numbers on the fourth page beneath the top sheet.<sup>11</sup> The list was signed by 24 employees. There is no direct evidence that any member of management was aware of the existence of the list.<sup>12</sup>

The Union scheduled a meeting for interested employees to follow work on January 8. Sitzes and a number of employees testified that Brannick also called a meeting of employees at the end of the shift on the same day. Brannick opened the meeting by stating to the effect that he knew "there's a union meeting tonight" and that he wished to "tell his side."<sup>13</sup>

The complaint alleges, and the General Counsel argues, that the reference to the union meeting was unlawful in that it created an impression that the employees' union activities were being monitored. General Counsel relies on an indistinguishable recent case, *Spring City Knitting Co.*, 285 NLRB 426, 427 fn. 4, 448 (1987) ("he told them that he understood there was a union meeting that night"). In the absence of any known superseding precedent, I conclude that Respondent violated Section 8(a)(1) as charged.

The witnesses further alleged that, as the complaint asserts, Brannick said that if a union was selected, "our pay would be cut to \$4.50 an hour and we would lose vacation time" (in the words of employee Beis). While there were peculiar variations on this theme, with some witnesses recalling, e.g., Brannick saying that the Union, not the Respondent, would have to pay for their wages and benefits, I believe that the evidence preponderates in favor of showing a threat of loss. Again, I think that Brannick probably suggested the likelihood of loss rather than its certainty; he himself testified that, when asked whether wages and benefits would be cut, he answered "I don't know" to the first and "I am not sure" to the second. I do not believe that the employee witnesses (I was especially impressed with Rubel and Beis) conspired to create out of whole cloth these threats of probable loss.<sup>14</sup>

The complaint alleges that on or about January 11, Hixon unlawfully interrogated an employee concerning "his and other employees' union activities," and Brannick "threat-

ened employees with loss of wages and/or benefits if union organizing efforts were successful."

Employee Danny Rubel testified that on the date mentioned, as he was walking along the assembly line, Hixon stopped him and asked "what he thought about what was going on in the plant." When Rubel asked for specificity, they moved into Hixon's office at the latter's suggestion to avoid the ambient noise, and Hixon explained that he was referring to "the union and all." Rubel said that he was "mostly for the union right now," that his investigation of the Charging Party made it look "real good" to him, and that he believed the union could "help us and the company." Just then, Brannick entered the office and, when he asked what was going on, Rubel repeated his pronouncement. Brannick said that he had once worked in a union shop, that it had accomplished nothing, and that if the union came in, the employees' pay would drop to \$4.50 an hour and their vacation would be reduced to 1 week.

Respondent did not question Brannick or Hixon about this conversation at the hearing. Rubel was an appealing witness, and I credit his factual account. The test of whether interrogations are unlawful is whether "under all of the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1986). Stopping an employee for no purpose other than to probe his thoughts about union activity, without any indication that his answer will not jeopardize him, "reasonably tends" to affect his inclination to support a union. While the Court of Appeals for the Second Circuit, in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), held that the truthfulness of the employee's reply is a factor to be considered in evaluating the coerciveness of an interrogation, it would seem that taking cognizance of this element—an employee's particular reaction to the interrogation—comes uncomfortably close to rejecting the "reasonable tendency" approach, which the Board has always held to preclude an inquiry into the subjective effect of an interrogation or other 8(a)(1) conduct.

In any event, the fact that Rubel chose to be honest with his employer does not detract from the tendency of the questioning to dampen Rubel's willingness to support the Union.

As for Brannick's statement regarding the adverse consequences of unionism, *Gissel Packing Co. v. NLRB*, 395 U.S. 575, 618-619 (4th Cir. 1969), holds that such a "prediction" of loss, not "carefully phrased on the basis of objective fact," should be regarded as a threat of retaliation. I so conclude here.

On the following day, January 12, according to the uncontroverted testimony of employee Beis, while he was in Hixon's office receiving a writeup for tardiness, Brannick told him in the course of a conversation about the Union that it "would hurt us and drop our pay to \$4.50 an hour and we would lose vacation time."

Again, *Gissel Packing* requires a conclusion that Brannick's statement to Beis constituted "coercion" as prohibited by Section 8(a)(1).

The remaining 8(a)(1) violation was added at the hearing by oral amendment. It asserts that on February 17, Brannick unlawfully "solicited employee grievances."

The evidence shows that Brannick approached employee Herbert Hutson on February 21, 9 days before a scheduled representation election, and asked him if he would like to

<sup>11</sup> While the record discloses good reason for not trusting Sitzes' testimony, in this respect, he was confirmed by credible witnesses.

<sup>12</sup> Although the list is referred to in the record as a "petition," it bore no heading.

<sup>13</sup> Brannick testified that he had heard about the meeting from Hixon, who told him that "several employees" were discussing it; he did not deny having announced his knowledge of the union meeting to the employees.

<sup>14</sup> Rubel testified that he thought that an employee asked at this meeting whether the plant would move to Oklahoma, and Brannick replied that he did not know, that such a decision "would be up to the owners." The complaint alleges a threat of plant relocation "on or about January 8," but General Counsel's brief does not mention this testimony. I take this to be a decision by the General Counsel not to pursue the allegation, and I shall recommend its dismissal.

have the plant change from a 5-day week to a 4-day, 10-hour-day, workweek. Hutson testified, without controversy, that in July or August of 1989, he had suggested the idea to Brannick, who had replied that he "wasn't coming in there early in the morning."

According to Brannick, more than one employee had broached such an idea in the summer of 1989, but he had told them that Respondent "planned on having three shifts and there is only 24 hours in the day so that's probably not going to be feasible." However, after receipt from Spectus of a February 6 letter summarizing suggestions derived from, and already made during, a visit of January 22-25—including "Work 4 ten hour days with Friday through Sunday off"—and the owners having decided while meeting with Spectus in January "that we probably would not be going to three shifts, that we would try to do it on two shifts" as another window company did, Brannick decided that he was now free to allow the employees to work 4-day weeks if they wished. After speaking with the employees, he concluded that it would be best to have an informal election, which was held on February 23. The employees voted for the change and the 4-day week was instituted on February 26, the Monday prior to the Friday election.

As stated, the oral amendment to the complaint accuses Respondent of having violated Section 8(a)(1) when it "solicited employee grievances." Counsel for General Counsel, however, made the gravamen of the allegation clear when, in a colloquy during Hutson's testimony, she said, "We're saying solicitation of grievances, asking employees what they thought about their hours and then *granting them that*." It is the grant of benefit which is at issue here, and Respondent's reason for doing so was, as shown above, thoroughly addressed by Respondent during its case-in-chief.<sup>15</sup>

This seems to me to be a fairly close one. While I credit Hutson's undenied testimony that Brannick rejected his 4-day-week suggestion in the summer of 1989 by saying that he did not want to come to work that early, it seems likely that there was an element of levity in the remark. There is nothing in evidence to either contradict or confirm Brannick's testimony that Respondent was considering a 3-shift workday in the summer, when employees had spoken to Brannick about a 4-day week, but there may have been no documentation of that concept.

Nonetheless, it seems clear that the 4-day week certainly became "feasible," to use Brannick's word, no later than mid-November, when the second shift was laid off. At that point, Brannick certainly knew that Respondent would not be going to a 3-shift day for at least a good while; and yet Brannick did nothing to explore further the earlier-expressed desire of some employees to work a short week. It is true that the concept appears in the February 6 letter from Spectus, which purports to summarize, from their meetings of January 22-25, the "points we discussed that were time and money savers," and those discussions could conceivably have been the impetus for the change. We have no idea who injected the 4-day-week into those discussions; it does not sound like the detailed kind of other "time and money savers" outlined in Spectus' letter. There is no explanation of why Respondent waited until the Friday preceding the elec-

tion to offer the employees an opportunity to vote for a benefit which it had rejected as infeasible the preceding summer only because of the anticipated three-shift operation, which notion clearly had passed into oblivion by mid-November. Why, one wonders, were the employees not given this choice, if not in November, at least soon after the January 22-25 meetings with Spectus ended, instead of a month later and just prior to the election?

I conclude that Brannick's decision shortly before the election to grant the employees an opportunity which they had previously sought looks, walks, and sounds like an 8(a)(1) violation, and, Brannick's proffered explanation being unsatisfying, it is appropriate to find the General Counsel has established the alleged violation by a "preponderance of the testimony taken." Section 10(b).

#### VI. THE LAYOFF OF SANDRA WOODS

On January 9, the same day that Sitzes was discharged, as discussed hereafter, Sandra Woods, who had been employed as a hardware assembler since August 14, was laid off. Next to Sitzes, Woods had been the most active union supporter. I found Woods to be a credible witness, and I accept her testimony that she signed a union authorization card at the union meeting on January 8 and passed out a number of cards prior to work on January 9. Woods also notified perhaps 25-30 employees on January 4 that the list to be signed by those interested in the Union would be located on her worktable. There is no direct evidence that Respondent was aware of Woods' activity, but the record as a whole shows that some members of the work force were willing and, indeed, anxious to keep Respondent abreast of organizational activities.

On January 9, when Woods was laid off by Brannick, he told her that "production was low and . . . the day before that the salesman had only brought in one window." Brannick said she would be recalled when there was an opening.

Brannick testified that experts from the Spectus firm had made their first visit to the plant around the third week in December to assess the production process and had offered at that time a recommendation (among others) to "not have so many people putting on hardware" (aside from Woods, there were two other assemblers, Michael Meyer and Danny Talley). In addition, Respondent had noticed a downward trend in sales around the same time, and the decision on January 9 to lay off Woods "basically came to the lack of sales." Woods was chosen for layoff because, as she conceded, she required assistance in carrying the heavier windows after she had done her assembly work on them, and the two men needed no help.<sup>16</sup>

On January 12, Woods received a call from Hixon, offering her the janitorial position left open by the discharge of Larry Neff on that day, as later discussed. She refused the job because she believed herself incapable of hauling the heavy pieces of trash, just as she had been unable to carry the bigger windows when she did hardware assembling. On March 16, after the charge was filed in this case, Woods was recalled to work in another capacity and is presently employed by Respondent.

<sup>15</sup>The solicitation of grievances is not, as the Board has often stated, per se a violation of the Act. *Uarco Inc.*, 216 NLRB 1, 2 (1975); *City Products Corp.*, 251 NLRB 1512, 1518 (1980).

<sup>16</sup>Woods testified that if she had to choose one of the three assemblers for layoff, she would probably have selected herself.

Respondent's explanation for its decision to lay off Woods on January 9, the very day that Sitzes was fired, does not hold up very firmly under examination. Although Brannick testified that Spectus had advised him as early as the third week in December that he had too many hardware assemblers,<sup>17</sup> he chose to ignore the advice until Tuesday, January 9, when, in the middle of the week and the middle of the pay period, and the day after the first union meeting, he abruptly laid off the activist Woods.

Asked to explain the delay, Brannick testified that "we really believed" that the major accounts from ASI, the company owned by Respondent's co-owner Dick Ahrends, who had been promising such accounts to Respondent for months, would be "coming on the first of January," and he would have needed the whole work force to service those accounts; he found out, however, "during the first week in January," that Ahrends was not coming on, and so he waited until Tuesday of the second week to lay off Woods.

There are several problems here. One is that no one from ASI was called to corroborate Brannick.<sup>18</sup> A second difficulty is that Brannick earlier testified that the second shift was created by Respondent in August 1989 specifically to service the anticipated ASI accounts so that Respondent "could produce a high quality window" for Ahrends in October, the month he was supposed to start purchasing. Ahrends, however, "decided not to come on at that time," and when he had not done so by November 9, the second shift was dismantled.

Having gone to the trouble in August of establishing and training a second shift for the volume of business expected from Ahrends, it is hard to believe that Respondent would have disbanded that shift in November unless its co-owner had made it indubitably clear that he would not be buying his windows from Respondent in the near future. In the absence of supporting evidence from ASI, I am very much inclined to doubt, then, that it was not until January that Ahrends unmistakably declared that ASI "wasn't going to come on."

Thus, it appears that even though Respondent knew as early as November that it could not expect ASI's production, it did nothing to follow up on Spectus' alleged (but also uncorroborated) advice in or about the third week in December to pare down the number of hardware assemblers. But, as noted above, Brannick elsewhere attributed the layoff not to ASI's putative decision in early January, but to a "lack of sales," which "trend" Respondent had first noticed also around the third week in December. Respondent Exhibit 4, a summary of sales, production, and backlog from commencement of operations on May 9 through March 30, does show a decline in sales for the last 5 workdays in December (71 windows total), which, given that these days spanned the yearend holidays, might not be unexpected. However, for the 5 workdays between January 2 (the first working day after the Christmas shutdown) and January 8, Respondent sold 459 windows.<sup>19</sup> Thus, the "trend" immediately preceding Woods' layoff was clearly on the rise.

<sup>17</sup> Woods confirmed that, in December, Brannick had told her Spectus was "trying to find ways to cut back on people."

<sup>18</sup> It is very difficult, moreover, to understand why Ahrends, a part-owner of Respondent, was so reluctant to purchase windows from his own company.

<sup>19</sup> Sales in the 5 days between December 18-22 had been 350 windows.

Although I believe that, on the foregoing analysis, General Counsel has made a potent case for concluding that a "motivating factor" in the decision to lay off Woods was her union activity, *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), some factors at least superficially cut in Respondent's favor. It is argued by Respondent that the offer to Woods of the janitorial job on January 12 negates any suggestion of union animus in her original layoff. That argument carries a certain amount of force, but it also seems a reasonable inference that Woods foreseeably would not accept such a position.

It may also be noted that Respondent had recently, probably after January 2, hired a new employee (George Francis) into a position (weather stripper) which is the job Woods was eventually returned to in March. While there is evidence that Respondent did not follow a seniority system, there is also no evidence that it had formally adopted any policy denouncing deference to seniority in laying off.<sup>20</sup> At the time of her layoff, Woods was senior to more than 15 employees, including Francis.

The recall of Woods in March came, as noted, some 3 weeks after the charge was filed naming her as an alleged discriminatee. Woods testified that she was "recalled" on March 16; since that was a Friday, it seems unlikely that she actually began work that day, although she might have. It is of more than passing interest to note that the backlog on March 16 was 1475 windows, only two more than the 1473 shown for her layoff day of January 9.<sup>21</sup>

I conclude, in view of Woods' active union support and the likelihood that Respondent was aware of it, fortified by the timing of the layoff to coincide with Sitzes' discharge and with Woods' most vigorous union activity (including placement of the sign-up list on her table); the serious weaknesses in Respondent's explanation of why Woods was chosen and when, weaknesses and inconsistencies which no ASI official was brought in to corroborate or clarify; and on the basis of the entire foregoing discussion, that General Counsel has successfully established that Woods' union activities were a—indeed, *the*—motivating factor in her January 9 layoff. If I had to reach the point (but see *Limestone Apparel Corp.*, 255 NLRB 722 (1981)), I would conclude that Respondent has failed to demonstrate that, even in the absence of Woods' protected activity, she would have been laid off on January 9. *Wright Line*, 251 NLRB 1083, 1089 (1980). I therefore find that the layoff was violative of Section 8(a)(3) and (1) of the Act.

#### VII. THE DISCIPLINE AND DISCHARGE OF LARRY NEFF

Larry Neff was Respondent's janitor from August 21 until he was discharged on January 12. The complaint alleges that a written warning and a 3-day suspension imposed upon Neff on January 8, and his discharge on January 12, violated Section 8(a)(3).

<sup>20</sup> The evidence on the point is that when Respondent laid off the second shift, no second-shift employees with greater seniority bumped those first-shift employees with less seniority. However, I am not sure that total elimination of an entire shift of mostly short-term employees is dispositive of what Respondent might do with regard to seniority on a single shift.

<sup>21</sup> While Respondent had Brannick testify that four other laid-off employees were recalled in March to fill vacancies, there is no such testimony as to Woods.

Neff's prounion activity was less pronounced than that of Sitzes and Woods. He signed the "Union-interest" sheet on January 4 (after being told about it by Woods) and he signed a union card on January 8, presumably at the union meeting of that date.

According to Brannick, during the first part of his employment, Neff's work was "excellent," but it deteriorated later in the year. Douglas Beis, an alleged discriminatee testifying on behalf of General Counsel, agreed on cross-examination that Neff's work did "go downhill," insofar as floors not being swept well and trash cans being full a lot "in some areas." A second fellow employee, now the Union's recording secretary, testified, as discussed hereafter, that twice in January, Neff swept piles of dirt under the employee's work station.

Neff, whose mental acuity seemed limited, identified a "verbal warning" which was given to him in writing on January 8, 1990, but which shows the "Violation Date" as January 2, the day on which Brannick say she first spoke formally to Neff about his derelict performance. The sheet reads:

The plant has been in very poor condition, as far as cleanliness, a lot of paper, vinyl dust and cardboard on the floor. Larry has been spoken to by his First-Shift Supervisor, by Elmer Erutti, who has somewhat to do with maintenance [sic]. I have also spoken to him to keep this plant clean.

Neff signed the sheet without comment.

At some other time on January 8, Neff received a second warning sheet, this one filled out by Hixon and pertaining to a "Violation Date" of "1-5-90" (the block showing it to be a "Verbal warning" is marked and then the marking crossed out, and the "written" warning box is then cleanly marked). Hixon wrote:

Deliberately throwing trash under a work table. His position at Precision Window is janitor.

Matthew McCann, currently the Union's recording secretary, testified for Respondent that on January 5, for the second time that week, Neff "took a very large pile of dirt and just blatantly right there in front of me put it under my table, my station." McCann reported this "wrong" behavior to Hixon.<sup>22</sup>

Neff received his third warning sheet of January 8 probably late in the day. There was virtually no testimony about this document. The sheet shows that it was signed by Hixon and Neff, is dated January 8, and reads:

After being warned several times about cleaning the plant properly, Larry has refused to change his work performance, as well as his attitude toward his job. Which leaves me no choice, but to send him on a three-day suspension. To our disappointment, we found places that had not been cleaned the day before. We

gave the plant an afternoon inspection and found some of the same places still remained uncleaned.

Before we come to Neff's discharge, let us consider these three warning sheets (one of which, the "verbal" warning, is not specified in the complaint). It does seem stunning, as General Counsel urges, that Neff received three different forms of discipline on the same day. This industrial triple play, however, is not quite as suspicious when its components are considered individually.

General Counsel argues, as to the "verbal" warning, that "[n]o explanation was given for the delay between the the date of the alleged offense and the issuance of the warning." This is not correct. Brannick testified that his procedure was not to formalize a "verbal" warning until a "written" warning was imposed. Under such a procedure, Neff would receive both the verbal warning and the written warning on January 8, even if the first had been rendered orally on January 2. And while Neff's testimony on the area was quite uncertain, in answer to a question by General Counsel as to whether he had received any kind of discipline before he was fired, he came out, after some groping, with "January the 2nd, 1990." This would have been prior to *any* of the minimal union activity in which Neff engaged.

The second, "written," warning, given by Hixon for the McCann incident, occurred, according to McCann, on January 5, a Friday. It does not seem unreasonable for Hixon to have waited until Monday, January 8, to write up the warning.

As for the January 8 3-day suspension notice, which states that Brannick and Hixon had surveyed the plant in the afternoon and found it wanting, Neff was not asked at the hearing to address himself to this claim, but again he signed the sheet without comment.

If all three notices given on a single day had been solely produced and vouched for by only Brannick and Hixon and pertained only to incidents which occurred on that same day, the case would obviously be a lot stronger, but, as discussed above, there is evidence from both Neff and fellow employee McCann that two of the notices related to recent earlier events. Moreover, by the end of the day on January 8, Neff had engaged only in a small portion of his minimal union activity—the signing of the "interested" list. The union meeting and the card signing took place *after* Neff had been placed on suspension.

For the reasons set out above, I am dubious about the claim that Neff's union activity was shown to have played a part in the two warnings and the suspension, and I would dismiss these allegations. This leaves us to evaluate the termination of Neff after he returned from the 3-day suspension.

Elmer Erutti, who testified that he started talking to Neff about his job performance "long before December," said that when Neff returned from his suspension on January 12, he spoke with Neff about the fact that "much needed to be done because he was gone for three days"; this indicates that the plant was not really cleaned during the suspension period. Erutti showed Neff around the plant and pointed out what needed to be done. Then Erutti and Brannick walked through the plant to get an overview of the condition of the facility. That afternoon, the two managers toured the plant again and, according to Erutti, "everything looked pretty

<sup>22</sup> Neff testified that he did not push any trash directly under McCann's station, but (apparently) just piled up, near McCann's table, some dirt which he had swept up from both ends of the aisle. McCann was a rather uncomplex person who did not appear to be lying. Why Neff should have harassed McCann this way, I have no idea.

much the same.” It was decided that Neff should be discharged, which was accomplished by the following written statement signed by Brannick:

At 8:10 a.m., Larry Neff was spoken to by myself and Elmer Erutti, our personnel administrator [sic], about the poor quality of work. We viewed the plant in the morning and also at 3:45 p.m. in the afternoon and found the following areas still uncleared: Bays and Bows; Entrance area; Dock area; Trash by Double mitre saw; Trash by extrusions; Trash by glass area. Due to the above reasons, as of 1-12-90, Larry Neff’s employment with Precision Window is terminated.

At the hearing, Neff agreed that Brannick and Erutti spoke to him on the morning of January 12 about the poor quality of his work, but he asserted that he had thereafter cleaned all of the areas mentioned in the written statement of discharge. He did not, however, take issue, in the “Employee Comments” space of the discharge sheet, with those allegations.

I can perceive no decisive reason for finding that Brannick and Erutti were lying here. Neff’s claim that he generally “did a real good job of cleaning that plant clean” was contradicted by alleged fellow discriminatee Beis. I have almost no basis for crediting Neff regarding the kind of job he did on January 12, or for believing that Respondent would have made such an effort to rid itself of a minor union supporter like Neff. The matter is not, however, absolutely clear. There is a substantial glitch in the testimony of Brannick and Erutti as to whether, when they toured the plant in the morning of January 12, they made any effort to identify pieces of trash in order to ascertain later whether Neff had moved them. While Brannick stated, “We also marked specific cardboard that was on the floor so that—we didn’t want to make the mistake that Larry swept it up and then someone just threw more dirt there,” Erutti *denied* “mark[ing] any pieces of trash so that [they] could check when [they] went around later on.” This is possibly a serious discrepancy, but it also may be that Erutti simply forgot doing so.

It seems entirely possible that the discharge of Neff could have been an arbitrary power display of the kind in which employers occasionally indulge during organizing campaigns. In my view, however, the General Counsel has narrowly failed to establish that union activity was a motivating factor in the discipline or discharge of Larry Neff.

#### VIII. THE LAYOFFS OF JANUARY 17

As amended, the complaint alleges that employees Doug Beis, Dean Roussin, and Danny Rubel were laid off on January 17 because of their union activities.

##### A. Danny L. Rubel

General Counsel’s brief launches attacks on two fronts, arguing both that the layoff of the three employees<sup>23</sup> had no economic justification and/or that their selection for layoff was predicated on their activities in support of the Union.

<sup>23</sup> Cheryl Lamkin was also laid off on January 17. While she was named in the charge and the original complaint, the alleged illegality of her layoff was later amended out of the complaint, for reasons undisclosed by the record.

We first consider the portion of the argument related to the reason for the layoff in general.

Brannick testified that prior to January 17, the production “quota” had been 100 windows per day. On January 17, however, because of a “lack of sales” which “could not support producing 100 windows a day any longer,” Respondent had to decrease production in order “to try to maintain some backlog in the plant,” so it reduced the daily quota to 75 and laid off four employees. Employee Beis testified to his knowledge that the quota was dropped “from 100 to 70.”

Important to this explanation is Respondent’s Exhibit 4, the sales and production summary. It shows that on January 16, the day before the layoff, Respondent had a backlog of orders for 1163 windows,<sup>24</sup> and on the preceding day, 1245. The last time Respondent had shown such low backlog figures had been on July 5 (1233) and prior thereto, i.e., for almost the first 2 months of its operation. Its high point had been reached on September 7, with a backlog of 2167, but there was a gradual decline thereafter, and on December 28, the backlog dipped into the high 1200s. After a comeback in the following 2 weeks (hitting 1517 on January 4), the low mark of 1163 was reached on January 16. The figures bounced around thereafter, going as low as 1138 on January 18 and as high as 1417 on February 6, and thereafter generally staying at the 1000+ and 1100+ levels until March 6, when the backlog rose to 1288 and continued to pick up during the spring.

These figures tend to support an argument that a decision to reduce the work force on January 17 would not have been an irrational judgment. There are some grounds for suspicion, on two counts. One is that the daily production figures (which I am assuming, perhaps erroneously, are roughly equivalent to the “Number Shipped” column of R. Exh. 4) do not, individually or in the aggregate, amount to a figure of 75 windows per day. After January 17, the daily figures are wildly disparate, ranging from 0 windows shipped to 193. However, for the first 5 working days after January 17, an average of 65.6 windows were shipped, and for the next 5 working days, an average of 83 were shipped. Assuming that there is some correlation between numbers shipped and produced, these figures are not out of range for an average 75-window production quota.

The second questionable feature is why, if Respondent wished to cut production by 25 percent, it only laid off 4 employees out of a work force of at least 34 (see R. Exh. 7) instead of twice that number. This matter was not, however, inquired into at the hearing, and may be subject to technical production explanations. The question also may be seen to cut two ways. If Respondent was laying off because of the union activity, it might be thought that it would get rid of all the union supporters it possibly could, and its decision not to do so could be favorable to its defense. All told, I cannot find that the decision to lay off on January 17 was itself motivated by union considerations. Additional support

<sup>24</sup> General Counsel argues on brief that the backlog *on the day of layoff* was 1263, which is what the record shows. This figure includes an unusually large order of 186 windows on that day. Although the record is unclear, my assumption is that the layoff was decided upon prior to the orders received on January 17.

for this conclusion will be adduced in the subsequent discussion.<sup>25</sup>

With regard to the selection of the three alleged discriminatees, perhaps the strongest case is made for employee Rubel. Rubel was the “floater,” the only employee who was trained to perform nearly all of the jobs in the plant, so that he could replace missing employees. He signed the union-interest sheet on January 4; was at Sitzes’ house on January 7 when they arranged with Union Representative Mosley for the January 8 union meeting; notified several employees at work about the meeting; signed a union card at the January 8 meeting; placed union fliers on the lunchroom tables on January 9 (employees were present when he did so); passed out 6–8 authorization cards in the parking lot before and after work and in the lunch room during the week of January 9–15; and, on January 17, handed out union caps in the parking lot. As earlier discussed, on January 11, Hixon asked Rubel his views on the union activities and Rubel not only expressed support but also said he had investigated the Union and it looked “real good” to him, a sentiment he repeated to Brannick.

On January 17, the same day that Rubel passed out union caps in the parking lot, Brannick called him in and said that he would have to lay him off because “the company was losing money and sales were down real low and all this.” Rubel reacted angrily, asking how Brannick could lay off a man who “can do basically any job in the plant.” Rubel pointed out that Respondent was retaining George Francis, who had been hired on or about January 2 into the balancing and then the weatherstripping department and had been assigned, when Sitzes was discharged, to Sitzes’ welding job, which Francis was still learning at the time. Rubel also made note of the fact that Respondent had just the day before hired a man, Joe Beaty, to sweep the floors (presumably Neff had not been replaced since his January 12 discharge), but was choosing to lay off an all-position player. Brannick simply replied that “we don’t go by seniority, we go by what job can be eliminated,” and “a floater can be eliminated.” Rubel was recalled on March 1, when George Francis terminated his employment.

Brannick testified that there were two reasons for selecting Rubel for layoff. The first was that, since the quota was being reduced to 75 windows a day, “[w]e just didn’t have the work for a floater.” This makes little sense to me. Respondent was laying off only three permanently assigned employees, leaving perhaps 36 still employed (see R. Exh. 4 and Sitzes’ probably accurate testimony at Tr. 49). The need for a “floater” was only marginally diminished. Second, said Brannick, the review by Spectus had recommended that Rubel be let go because “a floater was a luxury.” Again, no Spectus witness was called to confirm that this suggestion had been made, and Respondent made no attempt to explain why the asserted suggestion by Spectus, which had been made perhaps around the third week in December, was not implemented until January 17, the day that Rubel passed out union caps in the parking lot (which, Rubel thought, was not seen by management).

Rubel was one of Respondent’s first employees hired on May 1. When the second shift was instituted in August, he

was assigned as the supervisor of the approximately 20 second-shift employees and apparently received a \$1-per-hour raise. When the second shift was terminated in November, Rubel was one of the four employees who were transferred back to the first shift; Brannick told him that he did “good work, and since I had been on first shift before, and had taken second shift as a supervisor, that he would take me back to the first shift.”

Thus, Rubel appears to have been, and had been treated as, a desirable employee in the past. But in January, he not only engaged openly and vigorously in union activities, but he expressed his support for the Union directly to Brannick and Hixon on January 11. Considering Brannick’s declaration of a dedicated determination to stay unorganized, by perhaps moving to Oklahoma or reducing wages and benefits, Rubel would have seemed the enemy incarnate from that moment on.

I find it inconceivable that Brannick was simply exercising business judgment when he chose Rubel as one of the four employees to be laid off on January 17. Rubel’s special skill was an obviously vital one—to be able to substitute for nearly every classification in the plant<sup>26</sup>—and it is simply beyond belief that Brannick thought that it made good business sense to let this ex-supervisor go while retaining even a welder-in-training who had been hired only 2 weeks previously and, as well, a brand-new, 1-day employee who was hired as a janitor, *a job which Rubel clearly indicated he was willing to take*. While Respondent stresses in the record and on brief that it does not follow seniority or afford bumping rights, that is to some extent controverted by Rubel’s uncontradicted testimony that Brannick, in moving him back to the first shift, said that he was doing so because Rubel “did good work” and “had been on first shift before.” The refusal to prefer the proven Rubel over two new employees in training also squarely collides, from a practical business standpoint, with Respondent’s explanation of its other layoff choices: that they were not as valuable as other employees in their categories.

I believe, therefore, that General Counsel has carried its *Wright Line* burden as to the allegation relating to Danny L. Rubel. His selection for layoff was clearly due to his expressed and demonstrated preference for union representation, and he would not in any other circumstances have been laid off.

#### B. Douglas Beis

Douglas Beis played a less active role in the union effort than Rubel. He signed the sheet on January 4, signed a union card on January 8, and on January 9 handed a card to the employee who worked next to him. Beis did not don a union cap on January 17, although more than one-half of the employees did.

Beis was a quality control inspector, along with Carl Cockman, who was hired one day later than Beis. Brannick explained at the hearing that, with the lower quota, two full-time quality control people were not needed, and he felt that

<sup>25</sup> On brief, General Counsel points to the fact that on January 17, the Union filed a petition for election, but there is no indication that Respondent was aware of its filing on that date.

<sup>26</sup> Rubel testified that he could perform all the jobs in the plant except for the bays and bows area. Brannick testified that when Rubel was recalled in March to take the job of the departing George Francis, who had replaced Sitzes as sash welder, Rubel needed a great deal of training, and finally could not master the work. But there is no testimony that, in January, Brannick considered Rubel incapable of performing that job.

"Carl could do a better job, had more experience in the industry and had been a quality control man longer<sup>27</sup> and just felt that his expertise in the windows would produce a higher quality window." The record shows that at the time of the hearing, Cockman was still the sole quality control inspector, although Cockman is "helped" when time permits by Wayne Alvey, whose "first job" is coordinating the remaking of broken windows. Beis testified that Cockman had prior experience in the window industry and stated that if he were forced to decide between himself and Cockman, he would "keep Carl."<sup>28</sup>

Having concluded that General Counsel has not sufficiently established that the January 17 layoff was contrived to defeat the Union, I am unable alternately to conclude, on this record, that the *selection* of Beis was an irrational (and therefore suspicious) exercise of managerial judgment. Beis' prounion activities were minimal and undoubtedly were no greater than that of many other employees. Brannick's explanation holds water; Beis himself agreed with Brannick's choice; and the evidence regarding Alvey's role in quality control lacks important detail. On this proof, I would not find that a *prima facie* case has been made out.

#### C. Dean Roussin

Dean Roussin signed the sheet on January 4 at the request of Sandra Woods, signed a union card on January 8, attended union meetings, and "talked about the Union with other employees." He had been hired on August 10 and, at the time of his layoff, was one of two glaziers, the other being Roger Elswick, who was hired 18 days after Roussin.

Roussin testified that Brannick told him on January 17 that work was slack and that he thought Elswick was a better worker than Roussin, which Roussin denied.<sup>29</sup> Brannick told him that he might be recalled in March or April. Roussin was reinstated on March 12; the record does not disclose the job to which he was recalled. He testified that even after he returned to work in March, Elswick continued to be the sole glazier, although someone helped him "occasionally."

Elswick was himself perhaps a more notable union activist than Roussin. He not only signed the sheet and a card at the January 8 meeting, but he also wore a union hat on January 17. If Brannick was shooting at union targets among the glaziers, he apparently hit the wrong one.

The reasoning given with respect to Beis applies even more strongly here. I would dismiss the allegation relating to Roussin.

#### VIII. THE DISCIPLINE AND DISCHARGE OF STEVE SITZES

As noted, on January 4, Sitzes arranged for the preparation of a list of employees interested in the Union. On January 5, Brannick gave Sitzes two "warning sheets," the first of which, marked as a "verbal" warning, dated with "Today's

Date" as "1-4-90," "Violation Date" as "1-2-90," and Brannick's signature as appended on "1-5-90,"<sup>30</sup> charged Sitzes with "annoying fellow co-workers." Sitzes wrote, "I did not do these things. I refuse to sign." According to Sitzes' undenied testimony, Brannick declined to identify the "couple of" coworkers or to show Sitzes "the papers they had signed."

The second warning sheet is marked as a "written" warning, bears "Today's Date" as "1-5-90," a "Violation date" of "1-4-90," and a signature date for Brannick of 1-5-90. This sheet reads:

This written warning is being issued because of repeated reports that you have been annoying and upsetting other employees while they are trying to concentrate on their job and while you are supposed to be producing and concentrating on your job. If you repeat this conduct, you will be given a three-day suspension. You are, of course, free to communicate with the other employees during nonproduction time.

Sitzes again refused to sign, writing that he "did not do these things."

As with Brannick's and Hixon's contradictory testimony, as discussed above, with reference to the nature of Sitzes' behavior on January 2 (or 3), as reported by Hixon to Brannick, the remaining evidence of record on this score is somewhat confusing. General Counsel introduced a document (received in response to a subpoena) which purports to be signed by employee Barbara Lampston, under a 5-paragraph typed heading assuring Lampston in five different ways that her statement "concerning reported complaints about annoyances during production time at Precision" was being voluntarily given. Lampston's handwritten statement reads:

Steve Sitzes is constantly annoying me during production time so I ask [sic] for a position change, which I did receive. 1-5-90.

Brannick amplified on this by saying that Lampston had come to Elmer Erutti on January 4 and stated that she "was being annoyed by the handbook [sic], that Steve was upset, kept annoying her and complaining to her about the lack of a raise, lack of a Christmas bonus."<sup>31</sup>

Erutti testified that he received two visits on this subject, the first from a "crying" Barbara Haywood, who told him that Sitzes was "aggravating and annoying" her while she was "trying to do her job." He immediately reported this to Brannick. Although Erutti was unsure about when this incident occurred, he testified that "within a week's time," perhaps in the first week of January, Lampston and Haywood came together to see him. They said at length that they were "tired of being aggravated" by Sitzes and his "nagging" and "complaining." This was also assertedly reported immediately to Brannick by Erutti. Brannick contradicted Erutti on this point, however, saying that Lampston had come to Erutti on January 4 and the latter had relayed the complaint to Brannick on January 5.

<sup>27</sup>Cockman had been in quality control since he was hired; Beis was not "promoted" to that position until about August 1.

<sup>28</sup>Beis also testified that when he was recalled to work on March 5 to cut frames on the saw for \$2 an hour less than he had received, he saw Alvey "over there every day helping to QC windows." There was no testimony as to the amount of time Alvey spent on this function immediately after January 17 and before March 5, nor was Beis asked to specify how much time Alvey spent doing this job each day after March 5.

<sup>29</sup>Brannick testified that there was not enough work to keep both glaziers busy, and he thought Elswick was "quicker and caused less breakage."

<sup>30</sup>Brannick testified that the first two dates were errors, and should have been January 5 and 3, respectively.

<sup>31</sup>It is not clear from Brannick's testimony whether he also personally spoke to Lampston about these matters.

A second document, headed by an identical 5 paragraphs of assurance of voluntariness, was also introduced by General Counsel. It is purportedly signed by Raymond (Butch) Cato on January 5, and it states, in handwriting, "Steve Sitzes was harassing [sic] me on the job on Jan. 5, 90. I reported it to my supervisor as soon as possible."<sup>32</sup>

Aspects of this evidence are worthy of comment. The first is that Respondent produced neither Barbara Haywood nor Barbara Lampston nor Raymond Cato to testify about their problems with Sitzes, and offered no explanation for their absence.<sup>33</sup> This apparent unwillingness to subject them to examination raises a serious question as to the reason for their absence.

Second, the first warning seems to correspond to the date that Hixon, not Erutti, had carried the word that Lampston and Haywood and another person had complained to him about Sitzes. I do not believe Brannick's testimony that the first warning bore an erroneous "Violation Date" of January 2; there is no testimony that anything occurred or was reported to Brannick on that date other than Brannick's testimony that Sitzes "virtually stopped production" before the employee meeting on that date. I think the use of the violation date of January 2 on the warning confirms Sitzes' testimony that the employee meeting occurred on that day.

Third, the extremely careful typed professions of voluntariness preceding Lampston's and Cato's statements were, I think, most probably prepared by an attorney. There is no reason to believe that such legal precautions would have been thought important unless Brannick understood, as of January 5, the day after the "Union-interest" list was signed, that Respondent was involved in a union organizational context. Sitzes, as noted, had been the prime mover in the preparation of the list, and the record makes very clear that in this shop, antiunion employees were quite enthusiastic about notifying Brannick as to what was going on.<sup>34</sup>

Fourth, Brannick testified that when Cato had complained to him on the morning of January 5, he said that Sitzes had been annoying him "about a union."

The state of the evidence does not make it easy to align the two January 5 warnings and the facts on which they were based. As far as I can tell, the "verbal warning" was addressed to Sitzes' alleged behavior on January 2 when, according to Hixon, Sitzes complained to a few other employees about the handbook changes and the lack of a wage increase. As earlier noted, this clearly protected activity, in the absence of a specific and legitimate rule prohibiting talking during worktime, can be lawfully punished only if "the employer can establish that the solicitation interfered with the employees' own work or that of other employees," *Daylin Inc.*, supra. Respondent has unquestionably failed to make such a showing here.

The second, "written," warning may be based upon what Brannick reported as the visit paid to Erutti on January 4 by Lampston. Again, in the absence of evidence that the asserted "annoying" and "complaining" by Sitzes about the

"lack of a raise, lack of a Christmas bonus" resulted in interference with Lampston's work rather than mere "annoyance," *Davlin* requires that the warning be rescinded. By issuing such warnings, Respondent violated Section 8(a)(1).<sup>35</sup>

The circumstances surrounding the discharge of Sitzes are also in dispute. Because broken machinery caused a plant shutdown at midday on Thursday, January 4, Hixon asked for volunteers to work on Saturday. Sitzes says that when he was approached by Hixon, he told him that he would prefer to respond to the request on Friday, but when Hixon insisted on knowing *instantly*, Sitzes said that he would not work. Sitzes further testified that the next day, Friday, having just received two warnings, he tried to stay in Hixon's good graces by telling him that he had spoken to his wife, "and she's having a birthday party for me on the 6th, but my birthday is not 'til the 24th." With that, Sitzes pulled out his driver's license to prove the latter statement, and Hixon looked at it and said "Fine." Hixon also said that, in any event, the absence of four other employees made it unnecessary for Sitzes to be there.

Hixon testified differently. He said that on Thursday, Sitzes became angry at Hixon's insistence on an immediate answer and complained to Brannick, who said Sitzes could give his answer the next morning.<sup>36</sup> On Friday, Sitzes allegedly told Hixon that he had conferred with his wife and "*Saturday is my birthday* and she told me that everybody was getting together for a surprise birthday party," so that he would be unable to work that day. Hixon said "Fine." Somewhat reluctantly, Hixon testified that Sitzes did not show him his wallet.

On Saturday morning, as Hixon sat in the office with shipping supervisor William (Joe) Brandon, he checked the files and discovered that Saturday was not Sitzes' birthday. When asked why he did so, Hixon replied, "No reason. I just felt real uneasy about it and . . . I just looked." On Monday, Hixon says, he asked Sitzes "how his birthday went," and Sitzes replied that "it was a birthday party and not a birthday," to which Hixon made no reply.<sup>37</sup> Hixon was asked whether Sitzes displayed his driver's license during that conversation, and he denied it.

Hixon says he notified Brannick that "Steve told me it was his birthday [and] that I found out it wasn't his birthday [and] that he was lying to me." They decided to discharge Sitzes; on Tuesday, Sitzes was called in and given, on a warning sheet form, the following message, which, in my view, is so defensive as to practically constitute a legal brief:

On the morning of January 5, 1990, Steve Sitzes blatantly lied to his supervisor, telling him that it was his birthday on January 6, 1990, thus stating the reason why he could not work. On January 8, 1990, Steve Sitzes, upon coming into work, told his supervisor that it was not his birthday and that he had a surprise party for himself on January 6, 1990. Precision Window views lying very seriously, as most companies do, and as our application states, if any information is falsified,

<sup>32</sup> As can be seen from the quotations above, General Counsel is half-wrong on brief in stating that the two employee complaints "alleged Sitzes 'annoyed' them on January 5, not January 3 or 4 as the warnings state."

<sup>33</sup> I note that the two Barbaras had been on the second shift and were among the few employees who had been selected to transfer to the first shift when the second was eliminated in November.

<sup>34</sup> The "small plant" doctrine would also seem to apply ideally here. *Wiese Plow Welding Co.*, 123 NLRB 616, 618 (1959).

<sup>35</sup> I need not consider the effect, if any, of Cato's statement to Brannick on the morning of January 5 that Sitzes had been bothering him "about a union," other than to point out that this testimony from Brannick is direct evidence that Brannick knew that Sitzes was actively engaged in union support.

<sup>36</sup> Brannick confirmed Hixon's testimony in this respect.

<sup>37</sup> Sitzes testified that Hixon did not mention the subject to him on Monday.

we have grounds for dismissal. We view lying to one's supervisor in the same frame. As of January 9, 1990, we are terminating Steve Sitzes' employment with Precision Window, for lying.

The first issue presented is whether Brannick believed that Sitzes lied to Hixon by telling him that Saturday was his birthday. I cannot rely upon my impression of the pertinent witnesses; Sitzes, Brannick, and Hixon all gave testimony which made them demonstrably unreliable.<sup>38</sup>

Reading Sitzes' testimony alone would almost certainly lead the reader to believe that Sitzes was not telling the truth. Assuming that he said to Hixon on Friday that he was having a birthday party on January 6, but that his birthday was really on January 24, what would make him think he needed to pull out his driver's license to prove the latter fact to Hixon? There obviously would have been no reason for Hixon to disbelieve the statement or for Sitzes to try to prove it. But although Hixon denied that Sitzes had showed him his license either on Friday or Monday, Brannick contradicted Hixon's version to some extent by testifying that Hixon told Brannick that on Monday, Sitzes had "made a very strong point . . . [that] it wasn't my birthday, it was my birthday party. And then he showed Rick his license and said, see, my birthday is on the 24th."

It would probably have been just as peculiar for Sitzes to have shown his driver's license to Hixon on Monday as it would have been for him to do so on Friday, but now we have both Sitzes and Brannick (quoting Hixon) saying that, in fact, he did so on one day or the other. While the foregoing shows us that sometimes Sitzes may be telling the truth, it does not help us much with the question of when. My intuition is that Sitzes did *not* tell Hixon on Friday that Saturday was his "birthday," but rather that it was his "birthday party."<sup>39</sup> If he had specified on Friday that Saturday was his "birthday," doubt that he would have contradictorily "made a very strong point" (Brannick quoting Hixon) on Monday that it had not been his "birthday," but rather his "birthday party."

I cannot resolve credibility with any confidence here, however, and, in reaching my conclusion that Sitzes' discharge was motivated by his union activities, I rely strongly on other factors. Brannick has displayed a strong animosity to the Union, including threats of plant closure and loss of wages; he knew, from Cato (and probably others), that Sitzes had been promoting the Union;<sup>40</sup> and he was aware from personal experience that Sitzes was a complainer, a "trouble" maker, and a potential "cancer" causer.

That Respondent was looking for something to pin on Sitzes is suggested by Hixon's testimony that he checked Sitzes' birthday date on Saturday for "no reason" other than

that he felt "real uneasy" about it.<sup>41</sup> Brannick conceded at the hearing that he failed to follow the graduated disciplinary procedure he had just recently established, by omitting the third step of suspension; he was not asked to explain this failure. Finally, the idea of discharging a "good employee" (Brannick's words) like Sitzes for lying about his birthday, in the context of a situation in which Sitzes admittedly had every right to simply refuse to work, seems absurd.<sup>42</sup>

Thus, there is no doubt here that if Sitzes had failed to give a reason for not working, or had simply said that he was having a party, his absence would have been accepted without question. To elevate his alleged lie about his birthday into a ground for discharge (while skipping over the third-step suspension) may justifiably be characterized as ludicrous. The absurdity of the discharge is caught in Brannick's quotation of Hixon's statement to him "[H]e blatantly lied to me to get out of working on a Saturday when he didn't have to begin with because it was volunteer."

All the circumstances persuade me that Sitzes' union and other protected activity constituted a "motivating factor" in his discharge, and that even if Sitzes did lie to Hixon about the date of his birthday, Respondent has not shown (as is its burden, *Wright Line*, supra), that discharge would have followed even in the absence of the protected conduct.

Respondent advances two additional arguments relative to remedial relief for Sitzes, both of which I reject. The first is that Sitzes acted so outrageously after he was discharged that, if a violation is found, Sitzes has forfeited his right to any remedy.

Hixon and two other witnesses testified that Sitzes was very upset as he left the plant after his discharge, that he cursed Hixon, called him obscene names, challenged him to fight, and threatened to kill him. All of this was from a distance of 25 feet or so. The killing was evidently to occur at 4:30, when the plant closed down. Sitzes admittedly did reappear at the plant at closing time, but when the police were called, he left. Sitzes testified that he neither cursed nor threatened to kill Hixon, although he did say that he would "kick [his] butt and beat [his] Mexican face in." Sitzes said that he returned to the plant to "pick up [his] riders," but left when ordered to by the police.

I believe the testimony that Sitzes did make a threat to kill Hixon; indeed, there is not a great deal of difference between that threat and Sitzes' admission that he promised to "beat [Hixon's] Mexican face in."<sup>43</sup> This is the kind of foreseeable loss of control by discriminatees frequently encountered by the Board in discharge situations, and the Board's practice, with court approval, is to disregard the expression of outraged resentment by an unlawfully discharged employee. *Anaconda Insulation Co.*, 298 NLRB 1105 (1990); *Blue Jeans Corp.*, 170 NLRB 1425 (1968); *NLRB v. M & B Headwear*

<sup>38</sup> Sitzes' hopelessly shifting testimony about whether or not he passed out cards prior to his dismissal is sufficient to undermine his credibility. Other instances of both internal and external inconsistency by Brannick and Hixon, some of them mentioned in this decision, similarly taint their testimony.

<sup>39</sup> Why this gathering should have prevented Sitzes from working on Saturday is a question that the parties did not get into. Presumably, the "party," if there was one, was not an afternoon picnic in St. Louis in January, but rather a nocturnal function.

<sup>40</sup> When Brannick was first asked on direct if he had "any idea" that Sitzes was involved in union activity at the time of discharge, he said "No." But when he was reminded of this testimony about Cato on cross, he said he had no "personal knowledge," only "hearsay."

<sup>41</sup> On this point, Brannick contradicted Hixon. Brannick said that Hixon had reported to him on Monday that, on Saturday, Joe Brandon "mentioned to Rick to check on Steve's record to see if it was his birthday, in fact." Hixon denied that Brandon had "suggest[ed] it."

<sup>42</sup> R. Exh. 7 shows that only 24 employees worked on Saturday. There was no denial of Sitzes' testimony that Hixon told him that he was not, in the end, needed because other employees whose work meshed with his were not coming in. Brannick agreed that there was no loss of employee time resulting from Sitzes' failure to volunteer.

<sup>43</sup> The fact that Respondent called the police when Sitzes reappeared at the plant is, in my judgment, some corroboration of the testimony that Sitzes had uttered the threat.

Co., 349 F.2d 170, 174 (4th Cir. 1965) (“The more extreme an employer’s provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression”).<sup>44</sup>

The fact, however, that Sitzes did return to the plant at quitting time can be argued to make the earlier threat more real and intimidating. Sitzes testified that he “had to pick up [his] riders.” There is no evidence in the record to contradict the claim that Sitzes had a carpool to which he owed an obligation, and the assertion is certainly not inherently unbelievable. But, whether or not his return to the plant evinced an intention to carry out his threat against Hixon, the fact is that he left without taking revenge (albeit under the watchful eye of the police) and has not since been shown to have made any attempt to harm Hixon.<sup>45</sup>

Finally, Respondent contends that Sitzes forfeited any right to reinstatement when he “willfully and deliberately perjured himself on the stand.” I agree that Sitzes was initially dishonest about his predischarge activity in handing out authorization cards, although in the end, he was hammered into telling the truth.

The Board has recently recognized that there may be cases in which a discriminatee’s false statements “amount to a malicious abuse of process” requiring forfeiture of remedies. *Owens Illinois, Inc.*, 290 NLRB 1193 (1988), quoting *Service Garage*, 256 NLRB 931 (1981). The general rule does not, however, apply here. In *Owens Illinois*, the administrative law judge found that the discriminatee lied in five instances, but he “credited the major portion of her testimony,” and the remedy was not withheld. In the instant cases, Sitzes’ falsification of one aspect of his union activity was eventually recanted, and did not amount to a “malicious abuse of the Board’s processes.”

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on November 20 and December 22, 1989, threatening employees with possible plant relocation if a union was selected; by, on November 20, 1989, and January 8, 11, and 12, 1990, threatening employees with loss of wages and benefits if a union was selected; by, on January 2, 1990, advising employees with respect to lawful complaints about terms of employment, not to cause trouble and to resign if they were unhappy; by, on January 8, 1990, creating the impression of surveillance of employee union activities; by, on January 11, 1990, interrogating an employee concerning his sentiments regarding union activities; and by, on February 17, 1990, granting a benefit to employees by allowing them

the option of changing their work schedule, Respondent violated Section 8(a)(1) of the Act.

4. By, on January 9, 1990, laying off Sandra Woods; by, on January 5, 1990, issuing warnings to Steve Sitzes, and, on January 9, 1990, discharging him; and by, on January 17, 1990, laying off Danny L. Rubel, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Other than as found above, Respondent has not committed unfair labor practices as alleged in the complaint, as amended, in Case 14–CA–20527.

#### THE REMEDY

The traditional remedies of a cease-and-desist order and posting of notices are appropriate here. In addition, having found that Respondent unlawfully discharged Steve Sitzes on January 9, 1990, and unlawfully laid off Sandra Woods on January 9 and Danny L. Rubel on January 17, 1990, I shall recommend that it be ordered to offer them immediate and full reinstatement, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings they may have suffered from the dates of their discharge and layoffs to the date of Respondent’s offers of reinstatement, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>46</sup> Although the record suggests that some of the discriminatees may have been fully reinstated in March, this remedy shall preserve that issue, if necessary, for the compliance stage of this proceeding.

I shall also recommend removal and rescission from Respondent’s files of the warning notices found unlawful here and of all documentation relating to the discharge and the layoffs.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>47</sup>

#### ORDER

The Respondent, Precision Window Manufacturing, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees because of any activities on behalf of the Aluminum, Brick & Glass Workers International Union, AFL–CIO, CLC (the Union), or any other labor organization.

(b) Threatening employees, for assisting or selecting the Union or any other labor organization, with plant relocation or loss of wages and benefits; granting benefits to employees to induce them to refuse to support the Union or any other labor organization; coercively interrogating employees; giving employees the impression that their protected activities are under surveillance; and advising employees, with respect to lawful complaints about terms of employment, not to cause trouble and to resign if they are unhappy.

<sup>44</sup>The directness and immediacy of the encounter is, I assume, what distinguishes *Clear Pine Moldings*, 268 NLRB 1044 (1984), a case relied on by Respondent, from the instant kind of case.

<sup>45</sup>Harassment that Hixon and his truck have received since the discharge was not probatively linked to Sitzes. Respondent also argues that reinstatement of Sitzes to work under Hixon would create a potentially unhealthy situation. Assuming that Sitzes desires reinstatement and that Hixon is still employed when Sitzes returns, the Board has held that “the difficult and awkward” situations between conflicting personalities to which reinstatement might lead is no bar to such a remedy. *Trustees of Boston University*, 224 NLRB 1385 (1976), enf’d. 548 F.2d 391 (1st Cir. 1977).

<sup>46</sup>See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

<sup>47</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If it has not done so, offer to Steve Sitzes, Sandra Woods, and Danny L. Rubel immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of this remedy section of this decision.

(b) Remove from its files the warning notices found herein to be unlawful and any references to the discharge of Steve Sitzes and the layoffs of Sandra Woods and Danny L. Rubel, and notify them in writing that this has been done and that their discharge and layoffs and warning notices will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(d) Post at its place of business in St. Louis, Missouri, copies of the attached notice marked "Appendix."<sup>48</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO FURTHER ORDERED that those portions of the complaint found to be without merit are hereby dismissed.

<sup>48</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing in which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employees to discourage membership in Aluminum, Brick & Glass Workers International Union, AFL-CIO, CLC (the Union), or any other labor organization.

WE WILL NOT threaten employees with loss of wages or benefits or with plant relocation; grant benefits to employees in order to affect their support for the Union or any other labor organization; coercively interrogate employees; give employees the impression that their protected activities are under surveillance; or advise employees, with respect to lawful complaints about terms of employment, not to cause trouble or resign if they are unhappy.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

WE WILL offer, if we have not done so, Steve Sitzes, Sandra Woods, and Danny L. Rubel their former jobs and WE WILL compensate them with interest for any loss of pay they may have suffered as a result of their adverse personnel actions.

PRECISION WINDOW MANUFACTURING, INC.